(3)

No. 91-590

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

UNION NATIONAL BANK OF LITTLE ROCK,
Petitioner,

vs.

ROBERT MOSBACHER, SECRETARY OF COMMERCE,
Respondent.

UNION NATIONAL BANK OF LITTLE ROCK,
Petitioner,

vs.

RICHARD SMITH, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY BRIEF

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ARGUMENT

I.

The Secretary's brief in opposition does not challenge the merits of petitioner's contention that the recognition of federal-officer removal jurisdiction in this case was erroneous and

contrary to the dictates of *Mesa v. California*, 489 U.S. 121 (1989). *See* Pet. Question 1 & Reason 1; Opp. at 3. The brief argues only that petitioner's contention is "irrelevant" and need not be reached. Opp. 3. This is so, the Secretary posits, because 19 U.S.C. § 2350 of the Trade Act of 1974 "clear[ly]" constitutes a direct grant of original subject-matter jurisdiction and therefore removal jurisdiction in this case may now alternatively be sustainable pursuant to 28 U.S.C. § 1441(a). Opp. 3-4.

The conflict with *Mesa* will not be relegated to irrelevance, however, unless this proposition is valid. If it is not, then the Eighth Circuit's erroneous affirmation of removal jurisdiction in violation of *Mesa* squarely presents an issue meriting review. For reasons that follow, the proposition asserted by the Secretary is incorrect. Moreover, if his reading of § 2350 is at a minimum debatable — which it certainly it — then all the more reason exists *to grant* the writ.

The Seventh Circuit interpreted § 2350 in *Citizens Marine National Bank v. U. S. Department of Commerce*, 854 F.2d 223 (7th Cir. 1988), *cert. denied*, 489 U.S. 1053 (1989). Judge Posner read the section as a statutory waiver of sovereign immunity that also served, in Trade Act cases, to eliminate the $10,000 jurisdictional ceiling contained in the *Tucker Act*'s grant of subject-matter jurisdiction to the district courts. *See id.* at 225; *see also* 28 U.S.C. § 1346(a)(2) (Tucker Act). Under this analysis, subject-matter jurisdiction fundamentally derives from the Tucker Act, not from the Trade Act. Section 2350 only removes the Tucker Act's $10,000 jurisdictional lid, and otherwise preserves intact the scheme of the Tucker Act. *See* Pet. 16-20. The operative language of § 2350 — "jurisdiction is conferred . . . *without regard to the amount in controversy*" (emphasis added) — thus makes perfectly good sense without construing it as an independent grant of subject-matter jurisdiction in the district courts.[1]

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[1] Notably, § 2350 does not say that jurisdiction is "hereby" conferred. This

(Footnote 1 continued on next page)

Furthermore, if, as the Secretary urges, § 2350 should be viewed as an independent source of jurisdiction, then the phrase "without regard to the amount in controversy" becomes superfluous and devoid of content. This is so because a statutory grant of subject-matter jurisdiction is automatically unconstrained by any jurisdictional amount limitation if none is mentioned; no such limitation will exist unless the statute expressly imposes one. *Compare* 28 U.S.C. § 1331 (which is silent regarding the amount in controversy for "arising under" jurisdiction) *with* 28 U.S.C. § 1332 (expressly requiring $50,000 minimum amount in controversy for diversity jurisdiction). Thus, if § 2350 were itself a grant of original jurisdiction, Congress would have had no need to include the words "without regard to the amount in controversy." Like any statute, § 2350 should be construed in such a way as will give meaning and effect to all of its provisions. The Secretary's urged reading would render these words superfluous, whereas the Seventh Circuit's view — that § 2350 merely removes the ceiling in the *Tucker Act*'s jurisdictional grant — gives them content and effect.

The Secretary's brief lists the issue whether § 2350 of the Trade Act grants the district courts subject-matter jurisdiction as a question presented by this Petition. Opp. Question 1. Assum-

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(Footnote 1 Continued)

is consistent with the view that it is some other statute (namely, the Tucker Act), not § 2350, that is doing the conferring of jurisdiction. It is also consistent with Judge Posner's view of § 2350 as a waiver of sovereign immunity. One effect of the sovereign immunity doctrine is that it precludes the court's exercise of jurisdiction. *See United States v. Mitchell*, 463 U.S. 206, 212 (1983) (waiver of sovereign immunity is a "prerequisite for jurisdiction"). In this context, § 2350's phrase "jurisdiction is conferred" is properly read merely to waive and undo sovereign immunity's jurisdictional bar that would otherwise exist. For these additional reasons the language of § 2350 relied upon by the Secretary has full meaning and effect without the need to elevate it to an independent grant of subject-matter jurisdiction.

ing for the sake of argument the question is properly presented,[2] this adds to, and does not detract from, the reasons for granting the writ. As explained in the Petition, the recognition of non-Tucker Act bases of jurisdiction in contract actions against the Government has significant ramifications, namely, erosion of the Tucker Act scheme by circumvention of the conditions attached to the Government's waiver of sovereign immunity. The issue whether § 2350 of the Trade Act (and its identically worded counterpart in the Small Business Act, 15 U.S.C. § 634) should be recognized as an independent grant of subject-matter jurisdiction in derogation of the Tucker Act scheme, is itself an important unresolved question worthy of the Court's review. *See generally* Pet. Reason 2; *see also* Pet. 18 n.13 (anticipating this potential issue). The potential presence of this issue underscores the appropriateness of this Petition as a vehicle for the Court to clarify and reinstate the viability of the Tucker Act scheme.

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[2] The Secretary's removal papers did not cite § 2350 as a grant of original subject-matter jurisdiction. Nor did they assert that removal was proper under 28 U.S.C. § 1441(a) by virtue of § 2350. *See* Pet. 6. Such a failure to invoke jurisdictional grounds with specificity has been held to be jurisdictionally fatal in the removal context. *See* authorities cited at Pet. 14. A serious question therefore exists as to whether the Secretary may assert at this late date a previously unarticulated ground for removal jurisdiction and whether, consequently, his asserted ground for denying certiorari has been properly preserved. (This is the second prong of the Secretary's contention that must true in order for the *Mesa* conflict to become "irrelevant.") Regardless whether the Secretary's § 2350 argument has been preserved, however, his basis for opposing certiorari is obviated: if his § 2350 argument has *not* been preserved, then the *Mesa* conflict is squarely presented and there is no obstacle to reaching it; if, on the other hand, the argument *is* properly presented, this merely adds to the certworthy questions presented on this Petition, as more fully discussed in the text, *infra*.

II.

The Secretary's argument that the jury trial issue (Pet. Question 2 & Reason 2) is not well presented because it could be resolved on F. R. Civ. P. Rule 38(d) waiver grounds, lacks merit and, in fact, begs the question. If, as petitioner contends, the Tucker Act — as the sole proper predicate for removal jurisdiction — would have barred a jury trial in the district court, *see* 28 U.S.C. § 2402, then the district court was without authority to conduct a jury trial. A jury trial was prohibited even if both the Secretary and petitioner had *consented* to a jury trial, as Rule 39(c) makes clear.[3] If a right to trial by jury cannot be conferred by both parties' consent in such a case, then *a fortiori* it cannot be conferred by one party's failure to consent to withdrawal of the other party's (ineffectual) jury demand.[4]

Petitioner's objection to the jury trial was made and preserved in both courts below (*see* Main Br. at 2 & Point III, B; Reply Br. Point IV, B),[5] was considered and rejected by the Court of Appeals (A-18), and is properly reviewable by this Court.

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[3] *"[E]xcept in actions against the United States when a statute of the United States provides for trial without a jury,* the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right." F. R. Civ. P. 39(c) (emphasis added).

[4] The Secretary's Rule 38 argument stems from the fact that petitioner made a jury demand in its state court complaint, which became the operative pleading in federal court after the Secretary removed the case. Petitioner's jury demand was thus made in and meant for the *state* court. It was ineffective in *federal* court by virtue of 28 U.S.C. §§ 1346(a)(2) and 2402. Furthermore, the crucial inquiry under Rule 38(d) is whether one party detrimentally relied upon the other party's jury demand by failing to make a demand of its own. Here, there could be no such reliance because the Secretary's Answer filed in the district court explicitly *denied* that the case was triable to a jury (A-36).

[5] Petitioner also specifically urged below that the sole proper basis for removal jurisdiction would have been the Tucker Act, which the Secretary had failed to assert in his removal papers. Reply Br. at 22-23.

CONCLUSION

The Secretary's urged grounds for denying the writ lack merit. The questions raised by this Petition are properly presented and, for the reasons given in the Petition and above, warrant review. The writ should be granted.

Respectfully submitted,

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